

APPENDIX C

DISCOVERY GUIDELINES OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND*

Table of Guidelines

1. Conduct of Discovery
2. Stipulations Setting Discovery Deadlines
3. Expert Witness Fees
4. Guidelines in Scheduling Depositions
5. Deposition Questioning, Objections and Procedure
6. Assertions of Privilege at Depositions
7. Making a Record of Improper Conduct During a Deposition
8. Delay in Responding to Discovery Requests
9. Guidelines Concerning Interrogatories, Requests for Production of Documents, Answers to Interrogatories and Written Responses to Document Requests

GUIDELINE 1: CONDUCT OF DISCOVERY

a) The purpose of these Guidelines is to facilitate the just, speedy, and inexpensive conduct of discovery in all adversary proceedings and contested matters before the Court, and these Guidelines will be construed and administered accordingly with respect to all attorneys, parties, and non-parties involved in discovery before this Court.

b) Compliance with these Guidelines will be considered by the Court in resolving discovery disputes including whether sanctions should be awarded pursuant to Bankruptcy Rule 7037 and Fed. R. Civ. P. 37.

c) Attorneys are expected to behave professionally and with courtesy towards all involved in the discovery process, including but not limited to opposing counsel, parties and non-parties.

d) Whenever possible, attorneys are expected to communicate with each other in good faith throughout the discovery process to resolve disputes without the need for intervention by the Court. In the event that such good faith efforts are unsuccessful, they should be promptly referred to the Court for resolution.

* These Discovery Guidelines are based on the Discovery Guidelines adopted by the United States District Court for the District of Maryland in July, 1999, and they have been adapted to incorporate bankruptcy terminology.

e) To the extent that any part of these Guidelines is considered by the Court to conflict with any Bankruptcy Rule, applicable Federal Rule of Civil Procedure, Local Bankruptcy Rule, or order of this Court in a particular proceeding or matter, then the conflicting rule or order should be considered to be governing.

GUIDELINE 2: STIPULATIONS SETTING DISCOVERY DEADLINES

Subject to approval by the Court, attorneys are encouraged to enter into written discovery stipulations to supplement the Court's scheduling order.

GUIDELINE 3: EXPERT WITNESS FEES

Unless counsel agree that each party will pay its own experts, the party taking an expert witness' deposition ordinarily pays the expert's fee for the time spent in deposition and related travel. See Local Bankr. Rule 7026-1(h). Accordingly, counsel for the party that designated the expert witness should try to assure that the fee charged by the expert to the party taking the deposition is fair and reasonable. In the event a dispute arises as to the reasonableness of the fee, counsel should promptly confer and attempt in good faith to resolve the dispute without the involvement of the Court. If counsel are unsuccessful, the expert's deposition shall proceed on the date noted, unless the Court orders otherwise, and the dispute respecting payment shall be brought to the Court's attention promptly. The factors that may be considered in determining whether a fee is reasonable include, but are not limited to: (1) the expert's area of expertise; (2) the expert's education and training; (3) the fee being charged to the party who designated the expert; and (4) the fees ordinarily charged by the expert for non-litigation services, such as office consultations with patients or clients.

GUIDELINE 4: GUIDELINES IN SCHEDULING DEPOSITIONS

a) Attorneys are expected to make a good faith effort to coordinate deposition dates with opposing counsel, parties, and non-party deponents, prior to noting a deposition.

b) Before agreeing to a deposition date, an attorney is expected to attempt to clear the date with his/her client if the client is a deponent, or wishes to attend the deposition, and with any witnesses the attorney agrees to attempt to produce at the deposition without the need to have the witness served with a subpoena.

c) An agreed upon deposition date is presumptively binding. An attorney seeking to change an agreed upon date has a duty to coordinate a new date before changing the agreed date.

GUIDELINE 5: DEPOSITION QUESTIONING, OBJECTIONS AND PROCEDURE

a) An attorney should not intentionally ask a witness a question that misstates or mischaracterizes the witness' previous answer.

b) During the taking of a deposition it is presumptively improper for an attorney to make objections or give instructions to the deponent that coach or suggest to the deponent the substance of how a question should be answered or to make objections which are not consistent with Fed. R. Civ. P. 30(d) (1), made applicable by Bankr. Rule 7030. Objections should be stated as simply, concisely and non-argumentatively as possible to avoid coaching or making suggestions to the deponent, and to minimize interruptions in the questioning of the deponent (for example: "objection, leading"; "objection, form"). If an attorney desires to make an objection for the record during the taking of a deposition that reasonably could have the effect of coaching or suggesting to the deponent how to answer, then the deponent, at the request of any of the attorneys present, or, at the request of a party if unrepresented by an attorney, shall be excused from the deposition during the making of the objection.

c) An attorney should not repeatedly ask the same or substantially identical question of a deponent if the question already has been asked and fully and responsively answered by the deponent. Upon objection by counsel for the deponent, or by the deponent if unrepresented, it is presumptively improper for an attorney to continue to ask the same or substantially identical question of a witness unless the previous answer was evasive or incomplete.

d) It is presumptively improper to instruct a witness not to answer a question during the taking of a deposition unless under the circumstances permitted by Fed. R. Civ. P. 30 (d) (1) , Bankr. R. 7030. However, it is also presumptively improper to ask questions clearly beyond the scope of discovery permitted by Fed. R. Civ. P. 26(b)(1), Bankr. R. 7026, particularly of a personal nature, and continuing to do so after objection shall be evidence that the deposition is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass or oppress the deponent or party, which is prohibited by Fed. R. Civ. P. 30(d)(3).

e) If requested to supply an explanation as to the basis for an objection, the objecting attorney should do so, consistent with Guideline 5(b) above.

f) While the interrogation of the deponent is in progress, neither an attorney nor the deponent should initiate a private conversation except for the purpose of determining whether a privilege should be asserted. To do so otherwise is presumptively improper.

g) During breaks in the taking of a deposition no one should discuss with the deponent the substance of the prior testimony given by the deponent during the deposition. Counsel for the deponent may discuss with the deponent at such time whether a privilege should be asserted or otherwise engage in discussion not regarding the substance of the witness' prior testimony.

h) Unless otherwise ordered by the Court, the following persons may, without advance notice, attend a deposition: individual parties; a representative of non-individual parties; and expert witnesses of parties. Except for the persons identified above, counsel shall notify other parties not later than five (5) business days before the taking of a deposition if counsel desires to have a non-party present during a deposition. If the parties are unable to agree to the attendance of this person, then

the person shall not be entitled to attend the deposition unless the party desiring to have the person attend obtains a Court order permitting him/her to do so. Unless ordered by the Court, however, a dispute regarding who may attend a deposition shall not be grounds for delaying the deposition. All persons present during the taking of a deposition should be identified on the record before the deposition begins.

i) Except for the person recording the deposition in accordance with Fed. R. Civ. P. 30(b), Bankr. R. 7030, during the taking of a deposition no one may record the testimony without the consent of the deponent and all parties in attendance, unless otherwise ordered by the Court.

GUIDELINE 6: ASSERTIONS OF PRIVILEGE AT DEPOSITIONS

a) When a claim of privilege is asserted during a deposition, and information is not provided on the basis of such assertion:

- i) In accordance with Fed. R. Civ. P. 26 (b) (5), Bankr. R. 7026, the person asserting the privilege shall identify during the deposition the nature of the privilege (including work product) that is being claimed.
- ii) After a claim of privilege has been asserted, the person seeking disclosure shall have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of privilege, including: (i) the applicability of this particular privilege being asserted; (ii) any circumstances which may constitute an exception to the assertion of the privilege; (iii) any circumstances which may result in the privilege having been waived; and (iv) any circumstances that may overcome a claim of qualified privilege. In accordance with Fed. R. Civ. P. 26(b)(5), Bankr. R. 7026, the party asserting the privilege, in providing the foregoing information, shall not be required to reveal the information which is itself privileged or protected from disclosure.

GUIDELINE 7: MAKING A RECORD OF IMPROPER CONDUCT DURING A DEPOSITION

Upon request of any attorney, party unrepresented by an attorney, or the deponent if unrepresented by an attorney, the person recording the deposition in accordance with Fed. R. Civ. P. 30(b), Bankr. R. 7030, shall enter on the record a description by the requesting person of conduct of any attorney, party, or person attending the deposition which violates these guidelines, the Bankruptcy Rules, applicable Federal Rules of Civil Procedure, or the Local Rules of this Court.

GUIDELINE 8: DELAY IN RESPONDING TO DISCOVERY REQUESTS

a) Interrogatories, Requests for Production of Documents and Requests for Admission of Facts and Genuineness of Documents.

The Bankruptcy Rules and applicable Federal Rules of Civil Procedure designate the time prescribed for responding to interrogatories, requests for production of documents, and requests for admission of facts and genuineness of documents. Nothing contained in these guidelines modifies the time limits prescribed by the Bankruptcy Rules or applicable Federal Rules of Civil Procedure. Attorneys

shall make good faith efforts to respond to discovery requests within the time prescribed by those rules.

Absent exigent circumstances, attorneys seeking additional time to respond to discovery requests shall contact opposing counsel as soon as practical after receipt of the discovery request, but not later than three days before the response is due. In multiple party cases, the attorney wanting additional time shall contact the attorney for the party propounding the discovery.

A request for additional time which does not conflict with a scheduling deadline imposed by the Bankruptcy Rules, applicable Federal Rules of Civil Procedure, the Local Rules of this Court or a Court order should not be unreasonably refused. If a request for additional time is granted, the requesting party shall promptly prepare a writing which memorializes the agreement which shall be served on all parties but need not be submitted to the Court for approval.

Unless otherwise provided by the Local Rules of this Court, no stipulation which modifies a Court-imposed deadline shall be deemed effective unless and until the Court approves the stipulation.

b) Depositions.

Unless otherwise ordered by the Court or agreed upon by the parties, eleven days notice shall be deemed to be "reasonable notice" within the meaning of Fed. R. Civ. P. 30(b)(10), Bankr. R. 7030 for the noting of depositions.

GUIDELINE 9: GUIDELINES CONCERNING INTERROGATORIES,
REQUESTS FOR PRODUCTION OF DOCUMENTS,
ANSWERS TO INTERROGATORIES AND WRITTEN
RESPONSES TO DOCUMENT REQUESTS

a) A party may object to an interrogatory, document request, or part thereof, while simultaneously providing partial or incomplete answers to the request. If a partial or incomplete answer is provided, the answering party shall state that the answer is partial or incomplete.

b) No part of an interrogatory or document request should be left unanswered merely because an objection is interposed to another part of the interrogatory or document request.

c) In accordance with Fed. R. Civ. P. 26(b)(5), Bankr. R. 7026, where a claim of privilege is asserted in objecting to any interrogatory, document request, or part thereof, and information is not provided on the basis of such assertion:

- i) The party asserting the privilege shall, in the objection to the interrogatory, document request, or part thereof, identify with specificity the nature of the privilege (including work product) that is being claimed;
- ii) The following information should be provided in the objection, if known or reasonably available, unless divulging such information would cause disclosure of the allegedly privileged information:
 - (a) For oral communications:

- (i) the name of the person making the communication and the names of persons present while the communication was made, and where not apparent, the relationship of the persons present to the person making the communication;
 - (ii) the date and place of the communication; and
 - (iii) the general subject matter of the communication.
- (b) For documents:
 - (i) the type of document;
 - (ii) the general subject matter of the document;
 - (iii) the date of the document; and
 - (iv) such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.
- (iii) Within twenty days after the receipt of the information contained in paragraph (ii), the party seeking disclosure of the information withheld may serve a motion to compel in accordance with the Local Bankr. Rule 7026-1.
- (d) In addition to paper copies, parties are encouraged, but not required, to exchange discovery requests and responses on computer disk in an ASCII or other commonly-accepted format if requested in order to reduce the clerical effort required to prepare responses and motions.